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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 307

WILLIAM M. O'KEEFFE, Deputy Commissioner,
Bureau of Employees' Compensation,
United States Department of Labor,

Petitioner,

v.

SMITH, HINCHMAN & GRYLLS ASSOCIATES, INC.,
and ROYAL INDEMNITY CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals is reported at 327 F.2d 1003. The opinion of the district court is reported at 222 F.Supp. 4.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that injury and death of an employee, while engaged in recreation, did not arise out of and in the course of his employment under the provisions of the Longshoremen's and Harbor Workers' Act (33 U.S.C. 901, et seq.), as made applicable in this instance by the Defense Bases Act (42 U.S.C. 1651, et seq.).

STATEMENT

The deputy commissioner found that "the conditions of the employment created a zone where he [Ecker] had to seek recreation under exacting and unconventional conditions." (R. 28.) The district court affirmed the finding and concluded that "therefore the accident and death of the decedent arose out of and in the course of employment." (R. 37.) The district court also concluded "the obligations and conditions of employment created the zone of danger out of which Ecker's injury arose."

The facts adduced before the deputy commissioner were limited to a stipulation of facts.

The employer was engaged in the performance of an engineering-management type of contract with the United States Government and with the Republic of Korea at the city of Seoul. (R. 20.) Ecker was engaged in the capacity of clerk-stenographer and assistant to the administrative officer in Korea. He performed all of the duties of his job within the city of Seoul. The employee did not live on a defense base or at the site where he worked, but received an allowance to live on the Korean economy. He had contracted to work for the employer for two years at that place.

The employer furnished no recreational facilities for its employees, but they were invited to participate in recreational activities furnished by the United States Government at Seoul. (R. 22.)

The employee lost his life from drowning when a boat, in which he was riding capsized on a lake located approximately thirty miles from Seoul. Transportation

to reach the lake was not furnished by the employer, nor was the boat. The particular activities of the employee at the time he met his death were in no way specifically authorized by the employer and took place without its knowledge. (R. 13.)

Employees utilized Government recreation facilities, and also frequently travelled on weekends and holidays for recreation. The accident occurred on the employee's Memorial Day weekend (R. 13.)

At the time of the accident, the employee and two companions were using a small aluminum boat, propelled by an outboard motor, to haul a load of sand across the lake to be used to build up the beach in front of the lakeside lodge occupied by the employee's companions, who were not fellow-employees of Ecker. The boat capsized and Ecker and one of his companions were unable to reach shore and were drowned. (R. 12.) The particular activity in which Ecker was engaged at the time of the accident was in no way authorized by the employer and was being done without its knowledge.

The court of appeals reversed the district court, holding that the accident and death of Ecker did not arise out of and in the course of employment.

ARGUMENT

The decision of the court of appeals in this case is based upon well-established principles of workmen's compensation law. There are no conflicting decisions, despite the contentions to the contrary in this regard, and the court of appeals was clearly correct in applying well-established principles of workmen's compensation law in denying compensability of an injury occurring while the employee was participating in recreational activities.

1. The statement of petitioner's contention here regarding the question presented, suggests that compensability of accidents under the Longshoremen's and Harbor Workers' Compensation Act is governed by more liberal standards when applied to defense-based employment. Petitioner concedes the correctness of the precepts recited by the court of appeals for the Fifth Circuit in *United States v. Pan American World Airways,* 5 Cir., 1962, 299 F.2d 74, that recreational activities are not considered within the course of employment except in limited circumstances of which company-sponsored recreation is the easiest illustration. Yet, it is urged that this settled rule of workmen's compensation law should not be applied in the instant case, simply because the employee was living and working in a foreign country. It is urged that there is authority for this interpretation of the Longshoremen's and Harbor Workers' Act, to be found in cases decided in other circuits. We submit that the decision in this case is not in direct conflict with any decisions of other circuits, or in conflict with any decision of this Court.

2. It is urged that the decision in this case is in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in *Self v. Hanson,* 9 Cir., 1962, 305 F.2d 699, and *Hastorf-Nettles, Inc. v. Pillsbury,* 9 Cir., 1953, 203 F.2d 641.

Self v. Hanson, supra, does not stand for any proposition that might be interpreted as an extension of liberalization of any principle of workmen's compensation law as applied to recreation activities of defense-based employees. The outstanding feature of the case is that the court considered it "as one of limited application in a situation where a recreational void had to be filled by the company." (305 F.2d 699, 703.) There, the employer "had to provide inducement for its recruits by providing for their recreation." "This they chose to do by sponsoring organized trips and projects and supplying cars for unsupervised recreation." (305 F.2d 699, 702.) The employee was injured in an automobile accident while occupying an automobile driven by her "boss", who was authorized in writing to use the car for recreation. As the court observed, the accident occurred on "one of the very few points on the island's roads [Guam] where MK-PK employees were authorized to go for recreation." (305 F.2d 699, 702.) While the court of appeals gave no specific recognition of the rule of law rendering compensable those injuries which occur as an incident to company-sponsored recreation, as recognized by the Court of Appeals for the Fifth Circuit in *United States v. Pan American Airways,* supra, the court's holding in *Self* is wholly consistent with earlier precedent, and is certainly not in conflict with the decision in the Fifth Circuit, decided upon facts wholly different from those in *Self.*

3. It is contended that another case decided in the Ninth Circuit, *Hastorf-Nettles, Inc. v. Pillsbury*, supra, is in conflict with the present case. We cannot agree. Again, the injury occurred in an automobile accident. The accident occurred within the confines of the military reservation, in Alaska, where the employee lived and worked, while he was riding in a vehicle which had been checked out for a recreational trip by its driver. The truck was owned by the "prime contractor" who provided all needed transportation for employees of its subcontractor, claimant's employer, and "it was customary for the prime contractor's drivers to pick up and give a ride to any workmen on the base, irrespective of whether the workmen were going on business or otherwise." (203 F.2d 641, 642.)

The court in *Hastorf-Nettles, Inc.*, supra, did observe that the occasion for the transportation was the employee's returning from a recreational trip in a distant town, and that there were no recreational facilities maintained in the military reservation where the employee lived. It predicated its decision, at least in part, upon the "isolated place of the employment" and "its remoteness from available recreation and its narrowed limits of normal pastime," implying that the risk of transportation to and from recreation under these circumstances was an incident of employment. That case, on the facts controlling it, is not in conflict with the instant case, even if the case had been decided wholly upon this rationale. However, the Court of Appeals for the Ninth Circuit relied heavily upon the principle that the injury is compensable when it occurs as an incident of transportation furnished by the employer, citing *Voehl v. Indemnity Insurance Company of North America*, 288

U.S. 162, 169, 53 S.Ct. 380, 77 L.Ed. 676, *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 480, 67 S.Ct. 801, 9 L.Ed. 1028, and *Liberty Mutual Insurance Co. v. Gray*, 9 Cir., 1943, 137 F.2d 926.

In the latter case, which was also governed by the provisions of the Longshoremen's and Harbor Workers' Compensation Act, the employee was being returned from a recreational trip to his place of work in a transportation facility hired by his employer for that purpose. In that case, the court remarked that it was conceded that the employee, on his way to work, was covered under the Act if the motor vehicle in which he was injured was furnished by the employer. (137 F.2d 926, 928.)

There is no language in the opinion of *Hastorf-Nettles, Inc.*, supra, from which it can be demonstrated that the court intended that its holding should stand for the proposition urged here—that a defense-based employee is automatically covered under the Act while engaged in recreation. An implied holding that risks of transportation are an incident of employment where extensive travel is required by that employment in order to reach reasonable recreation, which is not available at the remote outpost where employment requires the employee to live and work, does not support the contention that the case is in direct conflict with the holding here.

4. Petitioner infers that this court's holding in *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, stands for a proposition which is inconsistent with the decision in this case. In that case, the principal point at issue was whether an employee's response to humanitarian instincts by entering dangerous waters which he

had been forbidden to enter to attempt a rescue, could be said to amount to a departure from employment. The employee had been waiting for his employer's transportation upon premises maintained by the employer for recreational purposes, which it sponsored. That case is inapposite on the point involved here.

5. It is next urged that a case recently decided in the Court of Appeals for the Fourth Circuit, *Pan American World Airways, Inc., v. O'Hearne,* set out in full in petitioner's Supplement, is in "clear conflict" with the decision in the instant case. It appears that that case arose out of the same "jeep" accident as was the subject of consideration by the Fifth Circuit case of *United States v. Pan American World Airways,* supra, the claim in the former case having originated from a different Compensation district, and heard by a different deputy commissioner. The Court of Appeals for the Fourth Circuit held that injury to another occupant of the same motor vehicle was compensable. While this decision may, upon cursory examination, tempt one to find a direct conflict with the decision in the Fifth Circuit, that decision is certainly not in direct conflict with the instant case. The facts are not even remotely similar to those in the instant case, and a difference in facts found by different deputy commissioners can easily account for the different conclusions reached in the two circuits.

When Gondeck's case was before the Fifth Circuit, that court noted that the use of the "jeep" for recreational purposes was forbidden by the employer and that the employer did furnish free bus service between the camp and the town. It also noted that the accident occurred at a place which was not on the premises of the employer, and occurred when the claimant was not using a means of travel to and from a place of recreation

furnished by the employer. It appears from the opinion of the District Court in the *O'Hearne* case, supra, that upon a remand for further findings by the deputy commissioner, it was found that the employee, on a temporary duty assignment on San Salvador Island, "could not escape the work environment," because the Island was so tiny; it was noted that "the entire Island was practically the work site." (221 Supp. 515, 517). It appears also in that opinion that no transportation between town and camp was provided, contrary to the finding in the case as decided in the Fifth Circuit. Directly contrary to the finding of the Court of Appeals for the Fifth Circuit, was the deputy's finding in the *O'Hearne* case, supra, that use of the employer's "jeeps" for recreation was authorized, and there was no prohibition against riding in company "jeeps". It also appears, from the opinion of the district court in that case, that the accident occurred close to the main gate of the camp on a road maintained by the employer, and the Court of Appeals for the Fourth Circuit observed that the accident occurred either as a result of excessive speed or some defect in the road.

We submit that the most significant difference in the facts as they were considered in the two circuits, is the deputy's finding in the *O'Hearne* case, supra, that the Island was so tiny that the work site comprised the entire Island, that the size of the Island did not permit an employee to ever disassociate himself from the work environment. Those additional facts suggest the applicability of "bunk house" rule, under which it has traditionally been held that employees whose duties require them to remain constantly upon the premises of their employer, are continuously in the course of employment

with respect to all activities—even of a personal nature—which are engaged in while remaining on the employer's premises. See *Southern Surety Co. v. Shook*, Tex. 1931, 44 S.W.2d 425; *Lamm v. Silver Falls Timber Co.*, 133 Ore. 468, 286 P. 527.

It should also be noted that the opinion of the Court of Appeals for the Fourth Circuit, in the *O'Hearne* case, supra, observes that there is a conflict between the two circuits "if the evidence there adduced was of the same factual content as that offered here," As we have pointed out, it appears from the reading of the opinion of the district court in the *O'Hearne* case, supra, and a comparison with the case decided by the Fifth Circuit, that there was a difference in the factual content of the record. But in any event, the decision and rationale of the court in the *O'Hearne* case, supra, does not support the contention urged, that it stands for the proposition that injuries occurring to employees during participation in athletics or recreation are compensable under the Longshoremen's and Harbor Workers' Act, whether sponsored and maintained by the employer or not.

6. Petitioner suggests, by citation to many authorities from State courts, that there is some body of law or principle that changes the rules of compensability as they are applied to injuries occurring during participation in recreation. None of these cases has any application to the question involved in this case. Almost without exception, the cases involve rules applied in the so-called "travelling salesman" cases, cases involving injuries occurring during travel to and from lodging and meals while the employee is bound for or on a bus-

iness trip, or some special errand for his employer. One of the cases cited, *Alexander Film Co. v. Industrial Commission,* 136 Colo. 486, 319 P.2d 1074, clearly recognizes a distinction applicable to the "travelling salesman" cases between pure recreation, which results in a "stepping aside," and other attentions to personal needs which are generally held compensable in that class of case.

7. The decision in this case was correctly decided by the Court of Appeals for the Fifth Circuit. The deputy commissioner had found that the employment created a zone where the employee "had to seek recreation under exacting and unconventional conditions" and that therefore the accident and death arose out of and in the course of employment. This finding was confirmed by the district court which buttressed the finding somewhat to conclude that "the obligations and conditions of employment created the zone of danger out of which Ecker's injury arose." There was no evidence contained in the stipulation upon which the deputy commissioner entered his order, that could be said to give rise to these inferences. There is nothing in the record regarding any hazards or dangers at all, or concerning any zone of danger, to which the employee was ever subjected as a necessary incident of reasonable recreation—or travel required to reach it. At the time of his death, the employee's activities were wholly disassociated from his employment evironment. If the case had been decided in accordance with petitioner's contentions, the result would have been to completely emasculate the provision of the statute that the injury, in order to be compensable, must arise out of and in the course of employment. The alleged conflicts among decisions of the several circuits does not exist when the cases are analyzed. While

the *O'Hearne* case, supra, may seem to go far toward providing support for the contention that there is a conflict between it and the companion case decided by the Court of Appeals for the Fifth Circuit, the apparent conflict is elusory. Even if the conflict is said to exist, there is no conflict between the *O'Hearne* case, supra, and the instant case. There is nothing contained in the opinion of the Court of Appeals for the Fourth Circuit to suggest that it would have decided the instant case differently from the Court of Appeals for the Fifth Circuit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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